



U.S. Department of Justice
Civil Division
Federal Programs Branch
1100 L Street NW
Washington, DC 20005

By ECF

October 24, 2018

The Honorable Jesse M. Furman
United States District Court for the Southern District of New York
40 Foley Square
New York, New York 10007

Re: *State of New York v. U.S. Department of Commerce*, No. 18-cv-2921

Dear Judge Furman:

The Court should deny Plaintiffs' motion (ECF No. 389¹) to allow remote video testimony from—or in the alternative, de bene esse depositions of—three Commerce Department officials: Karen Dunn Kelley, Under Secretary of Commerce for Economic Affairs, performing the nonexclusive duties of the Deputy Secretary of Commerce; Earl Comstock, Deputy Chief of Staff; and Wendy Teramoto, former Chief of Staff.

Plaintiffs' only ground for their request is that Defendants produced additional documents after Plaintiffs deposed these three witnesses. At the outset, Plaintiffs seek to reopen these witnesses' testimony not only to ask about the few documents identified in the motion that were produced after their depositions, but for *all of their trial testimony*, including matters they already testified about at deposition. Pls.' Mot. at 1, ECF No. 389. When testimony is reopened because of newly produced information, however, "the questioning of the witness is limited to those questions relating to the newly produced information." *Dash v. Seagate Tech. (US) Holdings, Inc.*, No. 13-cv-6329, 2015 WL 4257329, at *6 (S.D.N.Y. July 14, 2015). The scope of Plaintiffs' request suggests that it is an attempt to subvert the Court's standard practice of receiving testimony from unavailable witnesses by written deposition excerpts. *See* Scheduling Order ¶ 2, ECF No. 323.

More importantly, as explained below, a month before these witnesses were deposed, Plaintiffs had received either redacted versions of or privilege logs with descriptions of nearly all of the documents they now want to ask the witnesses about. Yet Plaintiffs did not challenge Defendants' privilege assertions until *after* the depositions. Plaintiffs were thus on notice of the risk that they might not be able to question these witnesses about withheld information and nevertheless decided to proceed with their depositions. *See Universal City Studios, Inc. v. Corley*, No. 00-cv-277, 2000 WL 621120, at *4 (S.D.N.Y. May 12, 2000) (noting that, if party "choose[s] to conduct depositions before [it] ha[s] the documents and then later seek[s] to redepose witnesses whose testimony was taken before [it] received documents," opposing party can "oppose such redepositions on the ground that [the deposing party] made [its] own bed and should be forced to lie in it").

In any event, although subsequently discovered information can provide a basis for reopening a witness's testimony, reopening is justified only when the information is genuinely "new" such that

¹ For the Court's convenience, citations to docket entries and legal authorities in the PDF version of this letter brief are hyperlinked to the cited authorities in ECF and Westlaw, respectively.

it “trigger[s] questions that the discovering party would not have thought to ask at the first deposition.” *Keck v. Union Bank of Switz.*, No. 94-cv-4912, 1997 WL 411931, at *1 (S.D.N.Y. July 22, 1997). Even then, reopening the witness’s testimony is not warranted if the likely benefit would be outweighed by the burden that a new deposition would impose on the witness and the opposing party. *See Export-Import Bank of the U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 112 (S.D.N.Y. 2005). Here, none of the documents identified by Plaintiffs warrant reopening the questioning of Acting Deputy Secretary Kelley, Mr. Comstock, or Ms. Teramoto:

- **Unredacted portions of Mr. Comstock’s memorandum dated September 8, 2017:** First, Plaintiffs seek to question Mr. Comstock about an unredacted version of his September 8, 2017 memo recounting his discussions with other federal agencies about possibly reinstating a citizenship question on the decennial census. Pls.’ Mot. Ex. 1 at 0002458, 0009834, ECF No. 389-1. Defendants initially produced this memo on July 26, 2018, with redactions for limited portions protected by the deliberative process privilege. *See* ECF No. 299-1. Yet Plaintiffs did not challenge those privilege assertions until September 4, 2018, *see* ECF No. 299, *after* they deposed Mr. Comstock on August 30, 2018.² The subsequently unredacted portions of the memo thus do not warrant reopening Mr. Comstock’s testimony when Plaintiffs proceeded with his deposition despite knowing about those redactions and not timely challenging them. *See Universal City Studios*, 2000 WL 621120, at *4. Also, after Plaintiffs filed this motion, the Department of Commerce admitted in response to Plaintiffs’ requests for admission that “Mr. Comstock reported in his September 8, 2017 memorandum that the individuals with whom he spoke at the Department of Justice and the Department of Homeland Security had not expressed an interest in requesting the inclusion of a citizenship question.” Ex. 1 (response to RFA no. 96). That response “conclusively establishe[s]” the matter in this case, *see* Fed. R. Civ. P. 36(b), significantly diminishing any benefit Plaintiffs might get from questioning Mr. Comstock about the unredacted portions of the memo. *See Export-Import Bank of the U.S.*, 232 F.R.D. at 112. Mr. Comstock’s testimony about what other federal officials might have told him about their reasons for not wanting a citizenship question would also constitute inadmissible hearsay.
- **Unredacted portion of Mr. Comstock’s email to Secretary Ross:** Second, Plaintiffs seek to question Mr. Comstock about an unredacted version of his email to Secretary Ross stating that “[s]ince this issue will go to the Supreme Court we need to be diligent in preparing the administrative record.” Pls.’ Mot. Ex. 1 at 0003984, ECF No. 389-1. But as with the September 8, 2017 memo, Defendants produced a redacted version of this email on July 26, 2018 (*see* ECF No. 299-1), yet Plaintiffs did not challenge those privilege assertions until *after* Mr. Comstock’s deposition on August 30, 2018. *See* ECF No. 299; *Universal City Studios*, 2000 WL 621120, at *4. Also, Plaintiffs contend that Mr. Comstock’s email reflects “an apparent proposal to whitewash the administrative record because of likely judicial review.” Pls.’ Mot. at 3, ECF No. 389. But instead of showing some nefarious motive on Mr. Comstock’s part,

² The Court concluded that Plaintiffs’ showing of need was sufficient to overcome the privilege and ordered Defendants to produce an unredacted version of the memo. Scheduling Order at 1, Sept. 17, 2018, ECF No. 323.

the statement is much more plausibly read to mean exactly what it says: the Commerce Department should carefully prepare the administrative record—a reading consistent with fidelity to good-government principles and the “presumption of regularity” that applies to federal employees’ official duties. *See Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

- **Emails about communications with Mark Neuman:** Third, Plaintiffs seek to question Acting Deputy Secretary Kelley, Mr. Comstock, and Ms. Teramoto about five emails produced after their depositions reflecting conversations they had with Mark Neuman about the census. Pls.’ Mot. Ex. 3, ECF No. 389-3. But Plaintiffs can ask Mr. Neuman directly about those conversations at his upcoming deposition on October 28, 2018. *See* ECF No. 399 at 1. Instead of burdening the Acting Deputy Secretary, Deputy Chief of Staff, and former Chief of Staff by reopening their depositions, Plaintiffs should seek that information from another source that is more convenient and less burdensome. *See Export-Import Bank of the U.S.*, 232 F.R.D. at 112.
- **Email to Acting Deputy Secretary Kelley:** Fourth, Plaintiffs seek to question Acting Deputy Secretary Kelley about an email she received from Aaron Willard, with the subject line “notes from drive,” stating: “1) must come from DOJ; 2) court cases you can hang your hat on; 3) every Census since 1880, except 2000.” Pls.’ Mot. Ex. 4 at 0001403, ECF No. 389-4. But Defendants listed this email on the privilege log produced on July 26, 2018 (*see* ECF No. 299-1), yet Plaintiffs did not challenge the privilege assertion until *after* Acting Deputy Secretary Kelley’s deposition on August 28, 2018. *See* ECF No. 299; *Universal City Studios*, 2000 WL 621120, at *4. Also, Plaintiffs contend that this email contradicts Acting Deputy Secretary Kelley’s deposition testimony that she did not know the details about whether Secretary Ross wanted the Justice Department to support a request for citizenship information. Pls.’ Mot. at 3–4, ECF No. 389. But Acting Deputy Secretary Kelley testified unequivocally at deposition that she knew there were conversations between the Commerce Department and the Justice Department about the citizenship question. Ex. 2 (Kelley Dep. 126:18–127:4). She further testified that she did not participate in any of the conversations between Secretary Ross and the Justice Department and that Secretary Ross did not brief her on the content of those conversations. Ex. 2 (Kelley Dep. 127:13–128:3). There is therefore nothing inconsistent between that deposition testimony and the email from Mr. Willard—and no basis to reopen her testimony.
- **Email to Mr. Comstock:** Finally, Plaintiffs seek to question Mr. Comstock about a May 2017 email he received from David Langdon discussing Mr. Langdon’s research. Pls.’ Mot. Ex. 4 at 0003888, ECF No. 389-4. But as with the email to Acting Deputy Secretary Kelley, Defendants listed this email on the privilege log produced on July 26, 2018 (*see* ECF No. 299-1), yet Plaintiffs did not challenge the privilege assertion until *after* Mr. Comstock’s deposition on August 30, 2018. *See* ECF No. 299; *Universal City Studios*, 2000 WL 621120, at *4. Also, Plaintiffs can ask Mr. Langdon directly about his email at his upcoming deposition on October 26, 2018 (*see* ECF No. 399 at 1)—a more convenient and less burdensome alternative to reopening the deposition of the Deputy Chief of Staff. *See Export-Import Bank of the U.S.*, 232 F.R.D. at 112.

Even if Plaintiffs were entitled to reopen the testimony of Acting Deputy Secretary Kelley,

Mr. Comstock, or Ms. Teramoto, Plaintiffs should not be permitted to do so by live video transmission at trial. Plaintiffs contend that Federal Rule of Civil Procedure 43(a) authorizes the Court to “permit testimony in open court by contemporaneous transmission from a different location,” and that as long as that remote location is within the geographic scope of Rule 45(c), the witness’s appearance can be compelled by subpoena.³ Pls.’ Mot. at 2–3, ECF No. 389. But Rule 43(a) allows testimony by remote contemporaneous transmission only “[f]or good cause in compelling circumstances.” Fed. R. Civ. P. 43(a) (emphasis added). In all other circumstances, “depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena.” Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment. Here, the only purported “good cause” and “compelling circumstances” identified by Plaintiffs is a desire to question these witnesses about documents produced after their depositions. But the remedy for that situation (if it were founded) would be to allow Plaintiffs to reopen the witnesses’ depositions—Rule 43’s preferred means of securing testimony from witnesses beyond a trial subpoena’s reach. It does not constitute “good cause” or “compelling circumstances” justifying trial testimony by remote transmission.

More practically, allowing Plaintiffs to call these witnesses at trial by remote video transmission would be inefficient. Plaintiffs have not provided estimates of the length of these witnesses’ proposed live trial testimony, preventing the Court from gauging exactly how much longer the trial would be if their request were granted. But a conservative estimate is two additional trial days, given that (a) Plaintiffs’ alternative request is for 12 hours of de bene esse depositions from these three witnesses, and (b) Plaintiffs have indicated that, if their request is denied, they intend to offer over 6,000 lines of deposition testimony from these witnesses.

Plaintiffs’ alternative request for de bene esse depositions of these three witnesses should also be denied. Plaintiffs already took videotaped depositions of these witnesses during discovery. Like Plaintiffs’ request for live trial testimony by video transmission, Plaintiffs’ request for de bene esse depositions is not limited to testimony about the few documents identified in Plaintiffs’ motion that were produced after the discovery depositions. Instead, Plaintiffs seek de bene esse depositions for *all* of these witnesses’ trial testimony, including matters they already testified about at deposition. Plaintiffs provide no reason why offering designated excerpts from those deposition transcripts would be insufficient. Nor do they provide any reason why their desire for a second bite at the apple outweighs the burden on the witnesses of sitting for a second deposition and the burden on defense counsel of preparing for and defending those depositions instead of preparing for a trial scheduled to start in under two weeks.

Any request to reopen these three witnesses’ discovery depositions for the limited purpose of asking about the few documents produced afterwards should also be denied. As a threshold matter, Plaintiffs did not conduct a meet-and-confer on such a request as required by paragraph 2(C) of this Court’s individual rules and this Court’s specific order.⁴ See Order, July 19, 2018, ECF No. 204

³ In support of this contention, Plaintiffs rely on two out-of-circuit cases but acknowledge that their contention was rejected in *Lin v. Horan Capital Management, LLC*, No. 14-cv-5202, 2014 WL 3974585, at *1–2 (S.D.N.Y. Aug. 13, 2014). Other courts have also rejected Plaintiffs’ contention. *E.g.*, *Atkinson v. MacKinnon*, No. 14-cv-736, 2016 WL 3566278, at *1–2 (W.D. Wis. June 24, 2016).

⁴ When a similar issue arose with new documents produced shortly before the Rule 30(b)(6) deposition of Census Bureau Chief Scientist Dr. John M. Abowd, Defendants agreed to make him available for two additional hours of deposition testimony about the new documents.

(denying request to extend time for depositions without prejudice to renewed request “only after conferring with defense counsel”). Also, of the five specific documents cited in Plaintiffs’ motion, four were produced over a month ago. *See* Pls.’ Mot. Ex. 1, ECF No. 389-1 (produced Sept. 17, 2018); Pls.’ Mot. Ex. 4, ECF No. 389-4 (produced Sept. 11, 2018). Yet Plaintiffs offer no explanation for why they waited until the close of discovery to seek this relief, which they contend was unaffected by the Supreme Court’s stay. *See* Pls.’ Mot. at 5, ECF No. 389. Finally, Plaintiffs already questioned Acting Deputy Secretary Kelley and Mr. Comstock for the full seven hours permitted under Rule 30(d)(1) without saving any time for questioning about the information they knew had been withheld as privileged. In all events, if any of these witnesses’ depositions were reopened, they should be restricted to one hour and limited to questions about documents produced after the witness’s prior deposition.

Dated: October 24, 2018

Respectfully submitted,

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Exhibit 1

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION
COALITION, *et. al*,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
COMMERCE, *et. al*,

Defendant.

Civil Action No. 1:18-cv-05025-JMF Hon. Jesse

M. Furman

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' REQUESTS FOR
ADMISSION TO DEFENDANT UNITED STATES DEPARTMENT OF COMMERCE**

Pursuant to Federal Rules of Civil Procedure 26 and 36 and the Local Rules of this Court Defendant the United State Department of Commerce ("Defendant"), by and through counsel, provides the following objections and responses to Plaintiffs' requests for admissions.

OBJECTIONS WHICH APPLY TO ALL REQUESTS FOR ADMISSION

1. Separate and apart from the specific objections set forth below, Defendants object to any discovery taking place in this case to the extent such discovery is brought pursuant to claims purportedly under the Administrative Procedure Act, as resolution of any such claims should be based upon the administrative record in this case.

2. Each and every response contained herein is subject to the above objection, which applies to each and every response, regardless of whether a specific objection is interposed in a specific response. The making of a specific objection in response to a particular request is not intended to constitute a waiver of any other objection not specifically referenced in the particular response.

RESPONSE: Admit.

94. The Department of Justice had not agreed to request the addition of the citizenship question to the 2020 Census prior to August 8, 2017.

OBJECTION: Defendants incorporate by reference the above objections to the definitions and instructions.

RESPONSE: Admit.

95. From May through September 2017, Mr. Comstock attempted to identify someone outside the Census Bureau who would make a request for the addition of a citizenship question to the 2020 Census.

OBJECTION: Defendants incorporate by reference the above objections to the definitions and instructions.

RESPONSE: Admit to the extent that Mr. Comstock contacted Ms. Hankey, Mr. McHenry, and Mr. Hamilton to ascertain whether their agencies may have a need or use for citizenship data, including possibly for VRA enforcement, and whether based on that need or use, their agencies would consider requesting the inclusion of a citizenship question on the 2020 decennial census. Defendants otherwise deny this request for admission.

96. On September 8, 2017, Mr. Comstock reported on his efforts to identify someone who would request the addition of the citizenship question to the 2020 Census. He advised that, as of that date, he had not been successful.

OBJECTION: Defendants incorporate by reference the above objections to the definitions and instructions.

RESPONSE: Admit to the extent that Mr. Comstock prepared a memorandum, dated September 8, 2017, in which he identified discussions he had with Mary Blanche Hankey, James McHenry, and Gene Hamilton, concerning whether the Department of Justice and the Department of Homeland Security

would have any need or use for block level citizenship data for purposes of enforcement of the Voting Rights Act, and therefore had interest in requesting that the Census Bureau reinstate a citizenship question on the 2020 decennial census. Defendants further admit that Mr. Comstock reported in his September 8, 2017 memorandum that the individuals with whom he spoke at the Department of Justice and the Department of Homeland Security had not expressed an interest in requesting the inclusion of a citizenship question at that time.

97. On or about September 13, 2017, Defendant Ross and Jeff Sessions spoke about addition of a citizenship question to the 2020 Census.

OBJECTION: Defendants incorporate by reference the above objections to the definitions and instructions.

RESPONSE: Admit to the extent that on September 18, 2017, Secretary Ross and Attorney General Jeff Sessions had a conversation concerning a citizenship question on the 2020 decennial census. Defendants otherwise deny this request for admission.

98. On or about September 13, 2017, Defendant Ross inquired whether Jeff Sessions would support, and if so, request, inclusion of a citizenship question on the 2020 Census.

OBJECTION: Defendants incorporate by reference the above objections to the definitions and instructions. Defendants further object to the extent this request for admission calls for the disclosure of information that is subject to the deliberative process privilege and, accordingly, Defendants will not provide a substantive response to this request for admission.

RESPONSE: Admitted in part, denied in part. Admit to the extent that on September 18, 2017, Secretary Ross and Attorney General Sessions had a conversation concerning a citizenship question on the 2020 decennial census. Defendants deny that this conversation occurred on September 13, 2017. Any additional detail concerning this conversation is subject to the deliberative process privilege and, accordingly, Defendants will not provide such detail.

the Census Bureau's estimate that the decrease in self-response rates caused by adding a citizenship question to the 2020 Census "would lead" to an increase in cost of at least \$27.5 million. Rather, the Census Bureau stated in its January 19, 2018 memorandum that "the addition of a question on citizenship *could* increase the cost of the 2020 Census by at least \$27.5 million."

Dated: October 23, 2018

Respectfully submitted,

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Exhibit 2

Exhibit 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

vs. Case No. 1:18-CF-05025-JMF

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Defendants.

Washington, D.C.

Tuesday, August 28, 2018

Deposition of:

KAREN DUNN KELLEY

called for oral examination by counsel for
Plaintiffs, pursuant to notice, at the office of
Arnold & Porter, 601 Massachusetts Avenue NW,
Washington, D.C., before KAREN LYNN JORGENSEN,
RPR, CSR, CCR of Capital Reporting Company,
beginning at 9:04 a.m., when were present on
behalf of the respective parties:

Veritext Legal Solutions

Mid-Atlantic Region

1250 Eye Street NW - Suite 350

Washington, D.C. 20005

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1 P R O C E E D I N G S

2 WHEREUPON,

3 VIDEOGRAPHER: Good morning. We are
4 going on the record at 9:04 a.m. on Tuesday,
5 August 28, 2018. Please note that the microphones
6 are sensitive and may pick up whispering, private
7 conversations and cellular interference. Please
8 turn off all cell phones and place them away from
9 the microphones, as they can interfere with the
10 deposition audio. Audio and video recording will
11 continue to take place unless all parties agree to
12 go off the record.

13 This is Media Unit 1 of the deposition of
14 Karen Dunn Kelley taken by counsel for the
15 plaintiff in the matter of New York Immigration
16 Coalition, et al., versus U.S. Department of
17 Commerce, et al. This case is filed in the U.S.
18 District Court for Southern District of New York.
19 This deposition is held at the law offices of
20 Arnold & Porter located at 601 Massachusetts
21 Avenue Northwest, Washington, D.C. 20001.

22 My name is Dan Reidy from the firm

1 though, is, simply, he's saying he's going to drop
2 off some review materials, conveying that they
3 were physical. Do you remember him doing that?

4 A No. I do not.

5 Q Can't help us, at all, about whether you
6 ever saw a legal memorandum from him?

7 A I cannot help you, at all.

8 Q Now, before the break, we were talking
9 about some documents that showed that Mr. Comstock
10 was working with Mr. Ross to determine if the
11 Department of Justice had any interest in adding a
12 citizenship question. And what I'd like to
13 determine is whether, in fact, you knew anything
14 about that effort prior to the time that the
15 letter came over from Justice in December of 2017.

16 MR. GARDNER: Objection. Form.

17 BY MR. GROSSI:

18 Q So my question is: Did you know anything
19 about an effort to get the Department of Justice
20 to send such a letter?

21 A I knew there were conversations between
22 Commerce and Justice.

1 Q And did you know the substance of those
2 conversations, even in summary form?

3 A That it was about the citizenship
4 question, yes.

5 Q Okay. And that Secretary Ross was hoping
6 to get the Department of Justice to support a
7 request for such information, correct?

8 A And that's where you're taking it to I --
9 those are details that I do not know.

10 Q You just know he was discussing it with
11 the Department of Justice?

12 A Yes.

13 Q And you didn't have anything to do with
14 any of those discussions; is that right?

15 MR. GARDNER: Objection. Form.

16 THE WITNESS: No.

17 Are you asking me if I participated in
18 any of those discussions? The answer is:
19 Absolutely not.

20 BY MR. GROSSI:

21 Q And he didn't brief you of any of those
22 discussions in the fall of 2017?

1 A Who are you speaking to, sir?

2 Q Well, let me ask, first, Secretary Ross?

3 A Not that I recall.

4 Q What about Mr. Comstock?

5 A Not -- he could have. Could not have. I
6 can't -- what I have said is that I knew the
7 conversations were going on about the citizenship
8 question. If somebody briefed me, I don't know
9 who it was, when it was. It was not on the top of
10 my radar. It was a back-burner issue that I knew
11 at some point would need to possibly be addressed
12 from the -- again, the work I was doing, which was
13 the budgetary work, the operational/technical
14 work, as well as the leadership work.

15 Q Were you surprised when the letter came
16 over in December 2017, that it was sort of out of
17 the blue?

18 A As we got closer to the letter coming,
19 there was a discussion that we thought we were
20 going to get a letter, and then a letter came,
21 and --

22 Q Okay. Who -- who had that discussion

1 technical work.

2 MR. ADAMS: I don't have any further
3 questions.

4 THE WITNESS: Thank you very much.

5 MR. GARDNER: The witness will read and
6 sign.

7 VIDEOGRAPHER: This concludes today's
8 video deposition. The time on the video is
9 6:00 p.m. We are off the record.

10 (Whereupon, at 6:00 p.m., the deposition
11 of Karen Dunn Kelley was concluded.)
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2 CERTIFICATE OF REPORTER

3 I, KAREN LYNN JORGENSEN, RPR, CSR, CCR the
4 officer before whom the foregoing deposition was
5 taken, do hereby certify that the witness whose
6 testimony appears in the foregoing deposition was
7 duly sworn by me; that the testimony of said
8 witness was taken by me in stenotype and
9 thereafter reduced to typewriting under my
10 direction; that the said deposition is a true
11 record of the testimony given by said witness;
12 that I am neither counsel for, related to, nor
13 employed by any of the parties to the action in
14 which this deposition was taken; and further, that
15 I am not a relative or employee of any counsel or
16 attorney employed by the parties hereto, nor
17 financially or otherwise interested in the outcome
18 of this action.



19 -----
20 KAREN LYNN JORGENSEN, RPR, CCR, CSR

21 Dated this 31st day
22 of August , 2018.